

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re THE MARRIAGE OF BONNI AND
GREGORY JOHNSON.

BONNI L. JOHNSON,

H025112

Respondent,

(Monterey County
Superior Court
No. DR32651)

v.

GREGORY D. JOHNSON,

Appellant.

Appellant Gregory D. Johnson appeals from a family court order denying his modification motion. We affirm.

I. Background

In March 2002, Gregory's¹ peremptory challenge to the judge handling the action was denied as untimely. In April 2002, Gregory filed a motion seeking a modification of child custody, visitation and child support and asking for his

¹ We refer to appellant and respondent by their first names for purposes of clarity and not out of disrespect.

attorney's fees and costs and injunctive relief. His motion was accompanied by his declaration and his updated income and expense declaration. Gregory's motion sought a recalculation of the percentage of time he had custody of the children for child support purposes. He also asked the court to order respondent Bonni L. Johnson to stop "playing games" with my visitation." Gregory's declaration stated that he believed he had paid all of his arrearages and should no longer be subjected to garnishment of his wages. He also claimed that Bonni had made health care appointments during his visitation time and had hired a daycare person without his input.

Bonni responded with a declaration in which she asserted that there had been no change in circumstances and asked for \$1000 in attorney's fees. She explained why orthodontist appointments had twice been scheduled during Gregory's visitation time. Bonni also submitted an updated income and expense declaration.

Gregory responded with another declaration in which he asserted that his income had declined while Bonni's had risen thereby meriting a change in child support. He continued to insist that he owed no arrearages, that the calculation of his custody time was inaccurate and that he should not be responsible for daycare expenses that were, in his view, unnecessary. Gregory also sought his attorney's fees and costs. He asserted that Bonni was now working at night, and that this fact justified changing primary custody to him since he had a day job and could spend more time with the children.

On April 18, 2002, Gregory filed a one-sentence pleading seeking a "Long Cause (2 hour) hearing" and asking the court to appoint a family services investigator to investigate his claims. This pleading was not accompanied by any supporting argument, offer of proof or declaration.

The hearing on Gregory's modification motion took place on April 26. At the outset, Gregory's attorney told the court that he had asked for a "Long-Cause hearing" because there were "several issues" concerning visitation, custody and "money," and the parties should "go to either negotiation, mediation, something." Bonni's attorney argued that a "Long-Cause hearing" was unnecessary because all of the issues had already been mediated and decided by the court and Gregory had failed to show a change of circumstances.

The court denied Gregory's request for a "Long-Cause hearing" and denied his motion. "I didn't see any substantial change in circumstance that was suggested." The court awarded Bonni \$1000 for her attorney's fees and costs. After the court had ruled, Gregory's attorney argued that there were "a lot of questions" about custody, the calculation of Gregory's custody time percentage and arrearages. He asserted that there was a change of circumstance because Bonni was now working at night. The court noted that it had already denied the motion and reiterated its decision.

On July 23, 2002, the court, apparently on its own motion, issued a minute order finding that some of the issues raised by Gregory's motion merited action. The court modified child support based on the updated income and expense declarations filed by the parties, ordered Bonni not to set health care appointments during Gregory's visitation time except for in an emergency, required Bonni to provide receipts for day care expenses to Gregory and ordered the attorneys to confer to resolve the issue of the current amount of child support arrears. The court subsequently issued a formal order containing these changes in which it reiterated that it found no "significant change in circumstances" with regard to custody or visitation. Gregory filed a timely notice of appeal from this order.

II. Analysis

In his opening appellate brief, Gregory raises two issues: (1) his peremptory challenge should have been granted; and (2) he was denied “due process” because he was not given a “full and fair hearing” on the factual issues raised in his motion. Bonni points out in her response brief that Gregory’s first contention is not properly subject to challenge on appeal, and Gregory “withdraws” that issue in his reply brief. (See Code Civ. Proc., § 170.3, subd. (d).) Instead, he tries to raise another issue in his reply brief that was never addressed in his opening brief. He claims that the court abused its discretion in ruling on the motion without referring the parties to mediation. Bonni has filed a motion to strike the portion of his brief addressing this new issue. “ ‘Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.’ ” (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Gregory offers no explanation for his failure to address this issue in his opening brief.² Since his failure to do so deprived Bonni of an opportunity to respond, we grant Bonni’s motion and strike that portion of his reply brief. Consequently, there is but one issue in this appeal.

Gregory claims that he “vigorously contested” the facts in Bonni’s declaration and “desired the right to cross-examine her.” He argues that the court’s refusal to hold a “Long-Cause hearing” deprived him of the right to present testimony and cross-examine Bonni. Gregory maintains that the court abused its discretion by “refus[ing] to permit an offer of proof.”

² It was improper to make an appellate challenge to a non-appealable order and to raise a new issue in his reply brief. Gregory’s attorney also cites a nonpublished case in his reply brief. This also was improper. (Cal. Rules of Court, rule 977.)

Gregory ignores the record that is before us. Gregory's request for a "Long-Cause hearing" did not make or seek to make an offer of proof, did not expressly ask for the right to present testimony or cross-examine Bonni and did not offer any suggestion of "good cause" for a lengthy hearing. The Superior Court of Monterey County, Local Rules state that "[i]n all [family court] law and motion matters, declarations shall be submitted in lieu of testimony pursuant to California Rules of Court, Rule 323[.]" and "[t]estimony shall be received only upon a showing of good cause." (Super. Ct. Monterey Co., Local Rules, rule 10.01(E)(1).) These rules also state: "Evidence, argument or comments will not be heard unless clearly raised in timely filed pleadings. Argument, if requested by the Court at the time of hearing, shall only address points of law. Timely filed declarations shall be considered the evidence submitted." (Super. Ct. Monterey Co., Local Rules, rule 10.01(E)(2).)

Gregory failed to make any attempt to comply with these rules by even purporting to make a showing of good cause for the receipt of testimony. The court, faced with the absence of any asserted basis for Gregory's request for a "Long-Cause hearing," undoubtedly did not abuse its discretion or otherwise err by rejecting his request and ruling on the motion based on Gregory's lengthy declarations, Bonni's declaration and the other facts set forth in the pleadings and the arguments in the pleadings and at the hearing. As Gregory does not even attempt to make any appellate argument that the court's substantive rejection of some parts of his motion was an abuse of discretion, we must affirm the court's order.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P.J.

Wunderlich, J.